No. 95-1474 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NEW MEXICO DEPARTMENT OF HUMAN SERVICES, *et al.*,

Petitioners,

—v.—

JOSEPH A. AND JOSEPHINE A.,
by their next friend Corrine Wolfe, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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47 pp

QUESTION PRESENTED

Whether this Court should review a court of appeals decision which did nothing more than vacate, on Fed. R. Civ. P. 52(a) grounds, a district court decision terminating a consent decree due to the district court's inadequate findings of fact and failure to articulate any law, and which defined the appropriate legal standard for terminating a consent decree.

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COUNTERSTATEMENT OF THE CASE

Homeless, neglected or otherwise dependent New Mexico children are the responsibility of Petitioners, the Department of Human Services, et al. (hereinafter "Petitioners"), in whose custody the children are placed. Petitioners are obligated by their receipt of federal funds to assist families to enable children to stay in the home and, if children are removed from the home, to develop permanency plans to enable them to leave state custody as quickly as possible, either by returning them home, if appropriate, or enabling them to be adopted.

Respondents are a class of neglected and dependent children in the custody of the New Mexico Department of Human Services. In 1980, Respondents filed suit under 42 U.S.C. § 1983, challenging the state's foster care system for its failure to develop and implement permanency plans for children in its custody. Petitioners were leaving large numbers of foster children in limbo, unable to return to their parents and without the procedures and processes that would enable them to be adopted. Even after Petitioners decided that a child should be adopted, they failed to take the steps necessary to free the child for adoption and to attempt to find adoptive parents. Thus, many children were languishing in long-term state custody, growing up without the option of becoming part of adoptive families that may otherwise have been available to them.

When the district court subsequently certified the plaintiff class, the court found that "it would appear to be an inescapable conclusion that the foster care program is nothing more than a long-term custodial care program." District Court Findings of Fact, Transcript, class certification trial, March 4, 1982 at 4 (Respondents' Appendix[1] 4a).

On September 23, 1983, the parties entered into a consent decree, approved by the district court, by which Petitioners

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[1] Respondents' Appendix is hereinafter "Resp. App."

agreed to correct these problems. *Joseph A. v. New Mexico Dep't of Human Services*, 575 F. Supp. 346, 354 (D.N.M. 1983) (Petitioners' Appendix[2] 1h-38h). Specifically, the consent decree requires that Petitioners take certain enumerated steps to ensure that children in state foster care custody receive "fair, reasonable and timely decision-making with regard to adoption" and "fair, reasonable and adequate procedures and practices necessary to ensure access to permanent adoptive homes."[3] *Id.* (Pet. App. 2h). The decree provides for active monitoring of Petitioners' compliance with the decree's provisions. *Id.* at 363-64 (Pet. App. 31h-33h).

Monitoring revealed that Petitioners were repeatedly failing to comply with key provisions of the decree. Children were continuing to remain in foster care for long periods of time without the benefit of the specific provisions of the decree intended to ensure timely, fair, reasonable and adequate procedures and practices necessary to ensure access to permanent adoptive homes. Respondents filed contempt motions on June 13, 1986 and April 10, 1987. Petitioners

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[2] Petitioners' Appendix is hereinafter "Pet. App."

[3] For example, the decree requires that decisions must be made for children in Petitioners' custody within reasonable periods of time, must be documented in the children's records and, when the appropriate goal is adoption, must be acted upon before it is too late for the children to have a chance to find permanent families. To ensure that required planning takes place, the decree establishes a detailed planning process and limits the length of time Petitioners can maintain a plan to return a child to his biological parents without adequate justification. *Joseph A.*, 575 F. Supp. at 356-59 (Pet. App. 8h-16h). The decree also mandates that adoption-related activities, including initiating proceedings to free a child for adoption, must take place within particular, specified periods of time. *Id.* at 359-61 (Pet. App.16h-21h). It also requires, among other system-related issues, that workers responsible for decree-related cases do not carry more than a specified maximum number of cases, *id.* at 356 (Pet. App. 5h), and that Petitioners maintain a computerized information system which will ensure accurate tracking of children's progress and monitor adherence to consent decree requirements. *Id.* at 361-62 (Pet. App. 24h-26h).

thereafter filed a motion to terminate the consent decree to completely end court supervision over Petitioners' compliance with the decree. In 1988, a special master appointed by the district court held hearings to resolve the motions.

On June 6, 1989, the Special Master filed a report (hereinafter the "1989 report") which recommended that the district court find that Petitioners had been in substantial compliance with the decree for a continuous period of twelve months.[4] 1989 report, Pet. App. 5g. Respondents objected to the Special Master's report, in large measure because it was conclusory, did not address the many areas in which compliance rates were very low, did not set out the basis for its decision, and failed to make sufficient findings of fact.

On November 8, 1989, the district court found that there was insufficient evidence upon which to rule on the Special Master's June, 1989 report recommending termination of the consent decree. *Joseph A.*, Civ. No. 80-0623-JB (D.N.M. November 18, 1989) (Pet. App. 2f). The court further stated that "[t]he Court must be satisfied that the spirit and intent of the Consent Decree will continue to be served beyond termination of the Consent Decree." *Id.* The district court therefore directed the Special Master to hold further hearings and submit additional findings of fact and conclusions of law addressing the court's concerns.

Additional hearings were held before the Special Master in May, 1991. Petitioners' own data showed compliance rates well below 50% on many key requirements. Higher compliance rates came from Petitioners' computer system, called "ADAPT," the accuracy of which was sharply disputed by Respondents and unresolved by the Special Master.

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[4] The consent decree requires that the decree remain in effect until it is found that the Defendants have been in substantial compliance with it for a continuous period of twelve months. *Joseph A.*, 575 F. Supp. at 364 (Pet. App. 34h).

Petitioner's own data showed, *inter alia*, the following low compliance rates:

* *26% compliance* with consent decree requirement that caseworkers provide a child's case information to [Department of Human Services] attorneys within 45 days of establishing the child's plan for adoption (66% late and 8% *not provided at all*);

* *0% compliance* with decree requirement that the Child Adoption Unit ("CAU") begin the adoption matching process upon notification that a plan of adoption has been established for a child;

* *50%–57% compliance* with requirement that the [Department of Human Services] attorney file a Termination of Parental Rights ("TPR") petition within 30 days after a caseworker requests a TPR;

* *55.3% compliance* with the requirement for internal reviews every six months (*with no reviews at all* 27.2% of the time); and

* *53%–86% compliance* with requirement that, once a child is freed for adoption, the child's file gets sent to CAU within the decree-mandated deadline of 5 days.

See Chart, Resp. App. 1b-5b.[5]

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[5] Many compliance rates measured in a record review conducted by the independent compliance monitor were also very low:

* *25.9%–37.2% compliance* with activities required to take place at the 30-day conference;

* *14% compliance* with provision mandating a justification in the file when a child's return home plan exceeds 18 months;

* *0% compliance* with requirement that there be a justification in the child's file for a return home plan where there is no parental contact for six months;

(*footnote continued*)

Despite these serious failings, on April 30, 1993, the Special Master issued a report (hereinafter the "1993 report") finding that Petitioners had been in substantial compliance with the decree, and recommending that the decree be terminated. Pet. App. 67e.

As with the 1989 report, the 1993 report of the Special Master was conclusory, did not resolve factual disputes, omitted or ignored several key areas of uncontested noncompliance, and recited compliance figures that, for the most part, ranged from 9% to 60%. In addition, citing no law whatsoever, the 1993 report relied upon a thirty-year-old dictionary definition of the word "substantial" in determining whether Petitioners had substantially complied with the decree.

On September 14, 1993, without further comment or discussion, based solely on the Special Master's reports, the district court affirmed the findings of the Special Master's two reports. *Joseph A.*, Civ. No. 80-0623-JB (D.N.M. September 14, 1993) (Pet. App. 1d-2d). On June 30, 1994, on the basis of the two special master's reports, the district court granted Petitioners' motion to terminate the decree. *Joseph A.*, Civ. No. 80-0623 JB (D.N.M. June 30, 1994) (Pet. App. 1c-4c).

Respondent children appealed the district court's June 30, 1994 order terminating the consent decree. In a decision dated November 9, 1995, the Court of Appeals for the Tenth Circuit vacated the order. While the court stated that a two-step analysis was necessary to review the district court decision, namely (1) a review of the legal standard to be applied, and (2) a review of the findings of fact in light of the legal standard, the court concluded that it was able to complete only the first step because of a fundamental flaw in the decision below.

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[5](. . . *continued*)

* *13%–51% compliance* with requirement for a caseworker to provide information to a [Department of Human Services] attorney within 45 days of decision to seek adoption for the child.

See Chart, Resp. App. 1b-5b.

In so ruling, the appellate court first set forth the legal standard of substantial compliance necessary to justify terminating a consent decree. The court stated that if "the essential purposes of the decree, which includes [sic] fair, reasonable and timely decision making and fair, reasonable, and adequate procedures and practices necessary to insure access to permanent placement" have been satisfied, then the decree should be terminated. *Joseph A. v. New Mexico Dep't of Human Services*, 69 F.3d 1081, 1089 (10th Cir. 1995) (Pet. App. 17b). The court criticized the district court for using an incorrect, vague dictionary definition of the word "substantial," instead of applying the correct legal standard, in deciding whether to terminate the consent decree.

The appellate court next attempted to analyze whether, under the correct legal standard, the district court properly terminated the consent decree. However, the court stated that it was unable to do so, finding that it could not meaningfully review the lower court's legal and factual rulings. The court found that it was unclear whether the Special Master had concluded that (1) Petitioners had complied with the essential purposes of the decree or (2) Petitioners' failure to meet certain of the decree's enumerated criteria had had no material adverse impact upon the overall objectives of the decree. The court reproached the district court for failing to explain or support its conclusion that there was substantial compliance with the decree—explanations which are required under Fed. R. Civ. P. Rule 52(a).

The court explained that "findings on details are necessary to the extent that those details are logically required to support the ultimate facts and legal conclusions. That is, merely deciding and declaring the ultimate facts fails to satisfy Rule 52(a) and prevents us from engaging in any meaningful appellate review." *Id.* at 1087 (Pet. App. 12b-12c).

Because the Special Master's report and the district court order adopting it failed to make the specific and detailed findings required by Rule 52(a), the Tenth Circuit was unable to

determine whether the correct substantial compliance standard had been met. Therefore, the judgment below was vacated and the case was remanded for the district court to apply the appropriate standard for terminating a consent decree and to specifically set forth the bases for its findings and conclusions.

Petitioners sought rehearing before the Tenth Circuit. On December 14, 1995, the Tenth Circuit denied a rehearing, and clarified that the consent decree was reinstated, effective November 9, 1995. Pet. App. 1a-3a.

REASONS FOR DENYING THE PETITION

Petitioners do not challenge the appropriateness of the Tenth Circuit's application of Rule 52(a), the rule upon which the court of appeals vacated the district court's decision to terminate the consent decree, but challenge the standard for termination which the court of appeals set forth before remanding the case.

The issues in this case are very fact-specific. The court of appeals' procedural decision was based on a district court record so flawed that the court of appeals could not even reach the substantive question of whether to reverse the termination of the consent decree. Instead, the Tenth Circuit has merely required that the district court support its decision to terminate the decree, so that the decision can be reviewed by an appellate court applying already established law interpreting Rule 52(a) of the Federal Rules of Civil Procedure. *See generally Kelley v. Everglades Drainage District*, 319 U.S. 415 (1942), *reh'g denied*, 320 U.S. 214 (1943), *motion denied*, 321 U.S. 754 (1944) (setting forth the requirements of Rule 52(a)).

In addition, the legal standard the Tenth Circuit set forth for terminating a consent decree is consistent with the decisions of this Court and with opinions from other circuits. This

Court has stated, in the context of a school desegregation decree, that a decree should be terminated only when the legal violations the decree was intended to resolve have been eliminated to the extent practicable. *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991). In this case, the Tenth Circuit has likewise stated that a consent decree should be terminated only if the essential purposes of the decree have been satisfied. *Joseph A.*, 69 F.3d at 1089 (Pet. App. 17b). This is well-established law, not a "hypertechnical and exceedingly strict definition of substantial compliance," as Petitioners contend (Pet. brief at 8) and does not require "absolute compliance with minutiae" (Pet. brief at 12).

The Tenth Circuit's opinion also does not contravene principles of federalism or the separation of powers articulated by this Court. Since the district court opinion precluded the Tenth Circuit from reaching the question of whether the lower court improperly terminated the consent decree, the court never had the opportunity to address any potential federalism or separation of powers issues. Additionally, Petitioners are raising these issues for the first time in their Petition to this Court. Therefore, Petitioners' public policy arguments are inapplicable and premature.

Nor did the Tenth Circuit fail to accord the district court the proper deference. While appellate courts which are reviewing facts should defer to the trial court's findings unless clearly erroneous, *Anderson v. Bessemer City*, 470 U.S. 564 (1985), in this instance the appellate court simply found the district court had failed to make the necessary findings as required by Rule 52(a). Despite the equitable powers of the district court, that court is obligated to specifically state its findings and support its conclusions, so that an appellate court can conduct a meaningful review. Since the district court did not do what was required by law, there is no basis for Petitioners' assertion that due deference was not properly accorded to the district court.

Certiorari is inappropriate because (1) the Rule 52(a) grounds for vacating the termination of the decree have not been challenged, (2) the legal standard set forth by the court of appeals is appropriate, (3) the court of appeals never ruled on the substantive issues, and (4) there are no public policy reasons to warrant it. Thus, Petitioners' petition for writ of certiorari should be denied.

I. THE TENTH CIRCUIT'S DECISION TO VACATE THE DISTRICT COURT OPINION WAS BASED UPON THE DISTRICT COURT'S FAILURE TO FOLLOW WELL-SETTLED RULE 52(a) REQUIREMENTS AND ITS DISREGARD FOR THE LEGAL STANDARD FOR TERMINATING A CONSENT DECREE, SET FORTH BY THE TENTH CIRCUIT AND DEFINED BY THIS COURT.

A. The Tenth Circuit's Holding Rests Solely Upon an Undisputed Rule 52(a) Analysis.

Rule 52(a) of the Federal Rules of Civil Procedure requires that,

> [t]o support [the relevant] determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion . . . can rationally be predicated.

Kelley, 319 U.S. at 420. At the district court level "there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." *Id.* at 421-422. There were no such findings in the district court's opinion or the Special Master's report on which it was based.

Petitioners seek to blur the distinction between a procedural decision and a decision on the merits. Yet, Petitioners cannot avoid the essential failure of their position: they do not contest the procedural decision of the Tenth Circuit, and the court

of appeals never reached the merits of this case. Petitioners seek certiorari on the substantive issues which were not resolved.

Ultimately, the issue of substantial compliance is a mixed question of facts and law. *Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1576 (9th Cir. 1994); *see generally Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (defines when an issue is a mixed question of law and fact); *U.S. v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir. 1984), *cert. denied*, 496 U.S. 824 (1984) (discusses the types of mixed questions which necessitate de novo review). The appellate court found that the district court had not set forth the facts and had been wrong on the law, thus precluding appellate review of the ultimate decision. Thus, Petitioners are seeking to have this Court grant certiorari to review the general definition of a legal standard that the appellate court was not even able to apply because of the inadequacy of the record.

The Tenth Circuit remanded the case because the district court, adopting the Special Master's 1993 report in its entirety, did not articulate its reasons for terminating the consent decree, did not reconcile the conflicting evidence, ignored without explanation certain key, uncontested evidence, did not explain whether the decree's essential purposes had been met (and if so, how), and cited absolutely no law to support its decision. Instead of complying with Rule 52(a), the district court simply recited disputed compliance figures for the decree requirements, many of which were very low, and concluded without discussion that there was substantial compliance with the decree.

For example, the consent decree requires that a permanency planning conference, attended by the child's social worker and the supervisor, shall be held no more than thirty (30) days after each child enters Petitioners' custody. During the 30 day conference, a permanency plan for the child must be written and signed by the caseworker, supervisor and, if possible, the

biological parents. The plan must specify: the permanency goal; a procedure to assess problems in meeting the goal; steps to be taken in order for the goal to be met; persons who will take the needed steps for reaching the goal; timetables for meeting the goal; and visitation schedules. *Joseph A.*, 575 F. Supp. at 356-57 (Pet. App. 8h-9h).

The Special Master concluded that Petitioners had "performed the 30 day conferences continuously and substantially for 12 months." 1993 report at 65 (Pet. App. 67e). However, the Special Master did not explain this conclusion in light of the overwhelming evidence that 30 day conferences with their required elements did not take place. The Special Master merely recited the conflicting evidence. Quoting from the 1993 report:

> 3.2 *30 day conference*
>
> *Dr. Shaening.* (Defts Ex. AAA-1) Using ADAPT information, Dr. Shaening compiled occurrence and timeliness of the 30 day staffing events for 2nd qtr 1987 through 4th qtr 1990. The performance for the 4th qtr 1988 thru 4th qtr 1990 was 84% to 94%.
>
> Dr. Shaening said ADAPT does not show the permanency plan required by the Consent Decree as part of the 30 day conference.
>
> Her review of the Quality Assurance study found low rates of performance of required elements for the 30 day conference.
>
> Dr. Shaening said obtaining parental participation in the 30 day conference was successful 50 to 60 percent of the time. Caseworker participation was 92% and for supervisors was 93%.
>
> She noted that in (Defts Ex. CCC) comparing DHS compliance between 1987-1988 and 1988-1991, the 30 day event timeliness had improved from 68% to 94%. It

was her opinion that DHS was in substantial compliance with 30 day conference requirements.

Dr. Ron Faich. Dr Faich reported timeliness and required content of the 30 day conference by DHS districts; 1st–63.6% 2nd–6.2% 3d–41.7% 4th–37.5% = state average 37.2%

Theodore J. Stein, Ph. D. (Resume Pltfs Ex. 84)

Dr. Stein is a consultant and professor of social welfare. He was involved in the writing of the Consent Decree and has reviewed compliance by DHS since 1982. For the matters under review he studied the reports of Dr. Faich, the Quality Assurance test results compiled by Dr. Shaening and ADAPT reports.

Dr. Stein also performed a case reading (Pltf Ex. 71) of 60 files from the 276 files Dr. Faich had reviewed.

Dr. Stein reports (Pltfs Ex. 89 and Pltfs 71), the files showed 63% with assessment plans, and 16% of the plans found, had all required elements.

He prepared graphs (Pltfs Ex 77) to illustrate his findings and opinions about the 30 day and 120 day conference having occurred, with Dr. Faich reporting, 37.2%, the Quality Assurance study, 12,7% and ADAPT, 89.0%.

Dr. Stein said it was his opinion that DHS was not in substantial compliance with the Consent Decree requirements for assessment plans.

John Kalejta, Mr. Kalejta is a Social Work Consultant with the DHS. He is a licensed master social worker.

He reviewed the same 60 file sample from Dr. Faich's study examined by Dr. Stein. Mr. Kalejta found plans in all files. He charted his findings, (Defts Ex. FFF). For each of 21 required elements he found content to vary from a 97% high (custody reasons) to a 32% low, (timetable for steps.)

> *Field Service Panel.* All members said the 30 day conferences were held regularly in their districts.

1993 report at 22-25 (Pet. App. 25e-27e).

The Tenth Circuit was unable to review the lower court's unsupported conclusions and mere factual recitations. Before ever conducting an analysis of whether the decree was improperly terminated—an analysis the district court's record precluded—the court had to vacate the decision below and remand the case to the district court. The court stated that it could not

> meaningfully review the lower court's legal and factual rulings because the special master's report (1) does not explicitly conclude that Defendants complied with the essence of each of the decree's overall objectives nor does it address specifically why the failure to meet certain of the enumerated criteria has no material adverse impact upon the overall satisfaction of the consent decree's objectives; (2) it fails to explain the methodology used; and (3) it fails to explain or set forth the subsidiary facts necessary to support its conclusions concerning Defendants' substantial compliance with the decree's specific requirements.

Joseph A., 69 F.3d at 1087 (footnotes omitted) (Pet. App. 12b). In remanding the case, the Tenth Circuit directed the district court to follow the mandates of Rule 52(a), and further set forth specific instructions on how this should be accomplished.

Specifically, the court instructed the district court that on remand, it should,

> (1) apply the substantial compliance standard set forth in this opinion [set forth below] . . . ; (2) outline its reasoning why Defendants satisfied (or did not satisfy) the essential purposes of the decree—i.e. justify its legal conclusions. If the Defendants are found to have devi-

> ated from any of the enumerated criteria set forth in the consent decree, the court should specifically address whether or not such deviation materially interfered with the essential purposes of the decree; (3) explain the methodology employed to reach its factual findings, and address the adequacy or inadequacy of the ADAPT data and episodal examples of noncompliance; and (4) specify the subsidiary factual findings and reasoning necessary to support its judgment as to Defendants' compliance with each of the overall goals and enumerated criteria in the decree.

Id. at 1089 (Pet. App. 17b).

Petitioners mistakenly equate the Tenth Circuit's instruction with a requirement of 100% compliance. On the contrary, the substantial compliance standard was one part of the instruction and, as shown in Point II, *infra*, was a reiteration of the standard set forth by this Court. The entire instruction is a procedural blueprint for the district court so that, in the second instance, there will be a detailed and factually specific record upon which the court of appeals can conduct a meaningful review of the substantive issue—whether the decree was improperly terminated.

Thus, the Tenth Circuit instructed the district court to include details about why it reached the specific conclusions it did; why deviations from compliance were discounted or excused; whether deviations from compliance materially interfered with the essential purposes of the decree; how it reached its factual conclusions, given the disputes in the facts; whether it relied on Petitioners' disputed computer data; and why it discounted the Petitioners' specific episodic examples of noncompliance. In addition, the court required the district court to list the underlying facts and reasons for finding Petitioners in compliance with each of the overall goals and enumerated criteria in the decree. The Tenth Circuit also properly required that the district court address the low compliance figures in the record and explain a finding of sub-

stantial compliance despite these facts (if indeed the district court makes such a finding), and despite disputes regarding inaccuracies in Petitioners' data. *Id.*, 69 F.3d at 1089 (Pet. App. 17b).

These guidelines, if properly adhered to, would give the appellate court sufficient detail to permit a review of the merits. Petitioners' attempt to convert the court of appeals' procedural blueprint into a requirement for 100% compliance, rather than accept it for the procedural tool that it is, is without merit.

B. The Tenth Circuit's Definition of the Standard for Terminating a Consent Decree is Consistent with the Standard Set by this Court and Other Circuit Courts.

Not only did the district court fail to issue findings of fact as clearly required by Rule 52(a), but it also failed to define, in legal terms, the standard of compliance it was applying. In vacating and remanding to the district court, the Tenth Circuit has compelled the district court to do what that court has not yet done—state the legal compliance standard and apply it. Until that point is reached, this case is not ripe for certiorari.

The standard which the district court must apply on remand is already set forth in cases decided by this Court and the circuit courts upon which Petitioners rely. In *Dowell*, a school desegregation case for which a decree was entered to remedy past discrimination, this Court held that, in examining whether the decree should be terminated,

> [t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and *whether the vestiges of past discrimination had been eliminated to the extent practicable.*

Id. at 249-250 (emphasis added). Continuing, the Court stated that

> [i]n considering whether the vestiges of de jure segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but '*to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.*' (citing *Green v. School Bd. of New Kent County*, 391 U.S. 430, 435 (1968)).

Id. at 250 (emphasis added). This Court found that "existing policy and practice with regard to faculty, staff, transportation, extracurricular activities and facilities" are "among the most important indicia of a segregated system." *Id.*

This standard requires a close examination of whether the essential purposes of a decree have been satisfied. This is no less than what the Tenth Circuit has asked from the district court in the instant case.

Freeman v. Pitts, 503 U.S.467 (1991), cited by Petitioners, applies the same standard as set forth in *Dowell* to a different set of facts. In *Freeman*, this Court found that a court could rightfully terminate certain discrete portions of a consent decree only if there had been "*full and satisfactory compliance*" with those parts of the decree to be terminated, as well as a good faith commitment to the whole of the decree and the predicate for it. *Id.* at 490-91 (emphasis added). In considering these factors, this Court stated that particular attention should be paid to the record of compliance at issue. *Id.* at 491. "Full and satisfactory compliance" is "substantial compliance" phrased in a slightly different manner.[6]

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[6] In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), a consent decree was modified because there was a change in conditions or circumstances surrounding the decree. Cited by Petitioners, *Rufo* is inapplicable to the case herein, since neither modification nor a change in circumstances is at issue.

The standards articulated by the circuit decisions upon which Petitioners rely are consistent with this Court's standard for terminating a consent decree: i.e. when "its essential purpose had been achieved," *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 34 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 58 (1994) and when "the goals of the litigation, as incorporated in the outstanding consent decree, have been completely achieved." *Mackin v. City of Boston*, 969 F.2d 1273, 1275 (1st Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993).[7]

Indeed, in *Langton v. Johnson*, 928 F.2d 1206 (1st Cir. 1991), the first circuit held that a step-by-step analysis of the essence of the decree-required programs and defendants' compliance with them was proper. Only because each and

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[7] The Eleventh Circuit case cited by Petitioners, *U.S. v. Miami*, 2 F.3d 1497 (11th Cir. 1993), like *Rufo*, is inapplicable to the case at bar. In *Miami*, the court stated in dicta that a flexible standard should be used in modifying or terminating consent decrees in employment discrimination cases, but specifically held that, to modify a consent decree, the standard is whether there is "a significant change in facts or law" which warrants revision of the decree. *Id.* at 1504. Since this case does not involve a change in circumstance requiring modification, Petitioners' citation to *Miami* is curious.

Petitioners' cite to *Smith v. Bland*, 856 F.2d 196 (6th Cir. 1988) (unpublished) (1988 U.S. LEXIS 12011) to infer that the Sixth Circuit has set a legal standard for terminating consent decrees in conflict with the standard set forth by the Tenth Circuit, is equally troubling. In *Smith*, after a prison reform consent decree was terminated when all but two sections of the decree had reached substantial compliance, plaintiffs' counsel did not appeal. Plaintiffs then appealed pro se, but only disputed the finding of substantial compliance as to two consent decree provisions, one of which was not even raised at the district court level. The Sixth Circuit did not overturn the district court's findings that terminating the consent decree was appropriate.

The Sixth Circuit did *not* articulate a standard for terminating a consent decree, since it merely examined whether plaintiffs' appeal of the finding of substantial compliance as to the only preserved issue—one consent decree requirement—would overturn the finding of substantial compliance as to the entire decree.

every area of non-compliance was reviewed and was explainable were defendants not held in contempt of the decree. Indeed, the issue addressed was merely contempt and not termination. Certainly, as in the present case, when the issue is a dismissal of all court jurisdiction over a case as well as contempt, the compliance standard is at least as strict.

Additionally, the Tenth Circuit itself has previously defined substantial compliance: whether defendants have taken "all reasonable steps [necessary] to comply with [a] court order," which are supported by objective facts. *Monfort, Inc. v. NLRB*, Nos. 90-9518,90-9527, 91-9501, 1994 U.S. App. LEXIS 7236 at *7-9, *39-43 (10th Cir. March 30, 1994).

Petitioners argue that its "due diligence" or "good faith" should be sufficient to meet the substantial compliance standard. While diligence is somewhat relevant to the question of whether a defendant could be held in contempt of a consent decree, it alone is not enough. *Fortin v. Comm'r of Ma. Dep't of Public Welfare*, 692 F.2d 790, 796-797 (1st Cir. 1982). Additionally, there is nothing in this record or the district court decision showing that even this standard has been met.

In this case, the district court did not use a legal standard in terminating the consent decree. When the court adopted the Special Master's report in its entirety, it adopted the Special Master's use of the dictionary definition of the word "substantial" derived from the fifth and six definitions taken from a thirty-year-old dictionary: "5. that is such in substance or in the main; as, a substantial victory, 6. considerable, large; as, a substantial gain." 1993 report at 48 (Pet. App. 51e) (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY (1961)).

The Tenth Circuit found the district court's dictionary definition of "substantial" "most unhelpful" and found that "it suggests a degree of imprecision and latitude that goes beyond the legal concept of 'substantial compliance' or 'substantial performance.' " *Joseph A*, 69 F.3d at 1086 (Pet. App. 10b).

The Tenth Circuit, in rejecting the district court's vague, non-legal standard used to terminate the consent decree, has not required anything different from that required by other courts. Consistent with the *Dowell* standard for terminating a consent decree based on satisfaction of the essential purposes of the decree, the Tenth Circuit stated that a consent decree may be vacated only when "the purpose of the consent decree—i.e. its essential requirements" have been met. *Id.*

As the Tenth Circuit found, the essential purposes of the *Joseph A.* consent decree are to provide "fair, reasonable and timely decision-making with regard to adoption, and . . . fair, reasonable and adequate procedures and practices necessary to ensure access to permanent adoptive homes . . . ." *Id.*, citing *Joseph A*, 575 F. Supp at 354. To determine whether the decree's essential purposes have been satisfied, the Tenth Circuit instructed the district court to analyze the areas where Petitioners have not substantially complied with the specific provisions of the decree to determine whether the areas not complied with are material to the decree's fundamental purposes. *Joseph A.*, 69 F.3d at 1089 (Pet. App. 17b).

There was substantial evidence before the court of appeals that the Petitioners had failed miserably to achieve that purpose and that, upon application of the "substantial compliance" test, the decree should not have been terminated. Petitioners had failed in the following several respects, among others, to comply with the decree:

— they failed to hold the required 30-day planning conferences with required elements, which are necessary to ensure timely decision-making regarding adoption and timely access to adoptive homes;

— they failed to justify in children's files why, when the children's plans were to return home, the children were still in care after 18 months;

— they failed to hold internal reviews every six months, leaving children with outdated plans and keeping children in foster care limbo;

— they failed to commence the adoption matching process in a timely fashion, causing further delays.

These factors highlight both the consent decree's purposes and the Petitioners' failure to achieve those purposes. Just as this Court directed compliance by the school board in *Dowell* to be measured by its essential operations, so too the Tenth Circuit held that compliance by the New Mexico Department of Human Services should be measured by its essential operations: policy and practice to insure timely, fair and reasonable decision-making about adoptions and timely, fair and reasonable access to adoptive homes. Petitioners' petition for writ should be denied because Petitioners have failed to show that the Tenth Circuit deviated from the standard set in *Dowell*.

The Special Master—and therefore the district court—also "subjectively weigh[ed] what was done against what was wanted." 1993 report at 48 (Pet. App. 50e). The Tenth Circuit rejected the Special Master's own subjective measure for determining the level of Petitioners' compliance since the Special Master did not support his subjective view with facts.[8] The Tenth Circuit acted entirely consistently with its prior ruling in *Monfort* in requiring that termination of a consent decree must be supported with an objective factual basis. Since the district court in this case conducted no legal test for "substantial compliance," and issued no findings of fact, the lower court decision was properly vacated and remanded.

Petitioners mistakenly assert that the Tenth Circuit reached the merits of the appeal when they state that "the Tenth Circuit . . . conclude[d] that the state had not shown substantial

[8] For example, the Special Master accepted Petitioners' low compliance rates and missed deadlines based on his unsubstantiated subjective view that Petitioners had offered "reasonable explanations" for doing so. 1993 Report at 60 (Pet. App. 53e-63e). However, there were no specific findings provided for the appellate court to review the conclusion of reasonableness.

compliance with the overall objectives of the decree." (Pet. brief at 12). This is wholly untrue. The Tenth Circuit found that the district court had failed to articulate its standard of review, not that the district court had mistakenly applied that standard. The Tenth Circuit's articulation of the legal standard—whether derived from contract law since all consent decrees ultimately are contracts—or from consent decree case law, which consistently acknowledges consent decrees' roots in contract law, *see generally U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 236-38 (1975) ("since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts"), is supported in its entirety by this Court and by other circuits.

The Tenth Circuit remanded this case for the district court to apply the legal standard *in the first instance*. Since the appropriate legal standard has not yet been applied here, and since Petitioners raise no meaningful challenge to the standard required by the Tenth Circuit on remand, this case is not ripe for certiorari.

II. THERE ARE NO OTHER REASONS FOR THIS PETITION TO BE GRANTED

Petitioners claim that review is warranted to establish a governing definition of substantial compliance for terminating consent decrees, so that "an important question of public law and policy" can be settled (Pet. Brief at 28). However, three factors substantially limit any future impact of this case.

First, the Tenth Circuit never reached the merits of this case. It was neither able to reverse nor affirm the opinion below because of the inadequacy of the district court opinion and its failure to meet Rule 52(a)'s requirements. Nevertheless, Petitioners are asking this Court to reach the merits of the case when the appellate court below was unable to do so. With a district court record so defective, and a failure to reach the merits in the Tenth Circuit, review by this Court is inappropriate.

Second, Petitioners have asked this Court to explore any potential conflict between this consent decree and the principles of federalism, separation of powers, and due deference to be accorded to district courts. This is not the appropriate case for such an exploration. Petitioners entered into this consent decree voluntarily and have never sought to have it dismissed on the grounds of federalism—only on the ground that they have achieved "substantial compliance." Thus, this issue was not before the district court or the Tenth Circuit, nor should it be addressed by this Court on this record.

In addition, Petitioners themselves concede that, in institutional reform cases, institutional control cannot return to the state until "the basic goals of institutional reform have been achieved," Pet. Brief at 15, and restoring control to a state or local government should only occur when "there is no longer a demonstrated need to monitor compliance." *Id.* Indeed, Petitioners explicitly admit that federal court supervision over this case should be withdrawn only "when the objectives of the consent decree have been met." *Id.*

When, as here, an appellate court cannot reach the merits—when it is unable to reach the question of whether institutional reform has been achieved; when it cannot address whether institutional control should be returned to the state or whether it is appropriate to accord the district court's findings due deference; and *when it simply decides a federal rules question*—then it is inappropriate for this Court to review those principles de novo.

Petitioners are asking this Court to review a case that stands for no more than an upholding of important procedural requirements which Petitioners themselves do not challenge. This is inappropriate for Supreme Court review.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

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